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freezing negotiations because any provision to which a LEC agrees immediately becomes a new high-water mark that can be selected by all other competitors — even those who already agreed to less favorable terms — and wholly without regard to the countervailing trade-offs embodied in the agreement as a whole. This absurd result is altogether antithetical to the scheme of private negotiations and binding agreements enacted by Congress.

ARGUMENT

I. THE FCC LACKS JURISDICTION TO REGULATE THE PRICES AND OTHER TERMS AND CONDITIONS OF LOCAL INTERCONNECTION, UNBUNDLING, AND RESALE

The FCC's Order rests on a fundamentally misconceived jurisdictional premise. In the Commission's view, "[t]he 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act," "recasts the relationship between the FCC and state commissions," and "grant[s] the Commission authority to establish regulations under [section] 251, binding on both carriers and states, for both interstate and intrastate aspects." Order ¶¶ 2, 24, 92. The Act does no such thing. On the contrary, Congress deliberately <u>rejected</u> proposals to shift intrastate regulatory authority from the States to the FCC, and it unequivocally assigned to the State commissions, not to the FCC, exclusive jurisdiction to determine the pricing of interconnection, resale, and unbundled network elements.

A. Congress Deliberately Refused to Disturb the Act's Historical Reservation of Intrastate Regulatory Jurisdiction to the States

For over 60 years, since the inception of the 1934 Act, Congress has confined the FCC's jurisdiction to interstate and foreign communications and has reserved for the States jurisdiction over intrastate communications. Prior to 1934, the Supreme Court had ruled in the so-called Shreveport Rate Case that the Interstate Commerce Commission (then empowered to regulate telephone companies) could prescribe intrastate rates in order to prevent discrimination against interstate traffic. See Houston, E. & W. Texas Ry. v. United States, 234 U.S. 342 (1914). When it adopted the Communications Act, Congress took steps, in response to the demands of State authorities, specifically to nullify the Shreveport Rate Case.

In section 2(b) of the Act, Congress imposed "express jurisdictional limitations on FCC power" designed to "fenc[e] off from FCC reach or regulation intrastate matters." Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986). The section provides (with exceptions not relevant here) that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b) (emphasis added). Only an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the FCC can "override the command of [§ 2(b)]." 476 U.S. at 377.[4] The courts have permitted only a single exception

[4] Section 2(b) reinforces an already powerful presumption against federal preemption of State public utility regulation — an area that this Court has recognized "is traditionally a state concern." H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 495 (8th Cir. 1992) (citing Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States")). As the Supreme Court has explained, such "historic police powers of the States" may not be "superseded . . . unless that [is] the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

to that rule: the FCC may preempt a State's exercise of its intrastate authority only if the State's regulation "negates the exercise by the FCC of its own lawful authority over interstate communication." NARUC v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989) (emphasis added).

Jurisdiction was a key issue again in Congress's consideration of the 1996 Act. The legislation that reached the Conference Committee could have been read to blur the traditional interstate-intrastate jurisdictional divide. Both the House and Senate bills would have added "part II of title II" (i.e., the sections addressing local exchange interconnection, resale, and unbundling) to the list of provisions exempted from the jurisdictional limitation in section 2(b). See S. 652, 104th Cong., 1st Sess. § 101(c)(2) (1995); H.R. 1555, 104th Cong., 1st Sess. § 101(e)(1) (1995). In addition, the Senate bill could have been read to require State commissions to conform their arbitration decisions to FCC pricing rules. See S. 652, § 251(d)(5)(D). Had these provisions been enacted, the FCC arguably would have been free to promulgate regulations governing intrastate matters traditionally reserved to the States, and the State commissions arguably would have been bound to apply those rules in proceedings arising under the new statute — essentially the scheme the FCC imagines that Congress did enact.

But neither of these provisions survived the Conference Committee. In response to objections voiced by the States,[5] the Committee deleted the proposed amendment of section

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[5] See, e.g., Initial Comments of National Association of Regulatory Utility Commissioners, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, at 10 (FCC May 16, 1996) (describing States' efforts to influence the Act before the Conference Committee); Comments of the Florida Public Service Commission, Implementation of the Local Competition

2(b), thereby leaving the traditional interstate-intrastate division wholly intact; added a new section 251(d)(3) expressly preserving State authority over access and interconnection requirements; and eliminated the Senate provision suggesting that the FCC could dictate the pricing of local interconnection, resale, and unbundled network elements. In its place, the Committee created a new statutory section (§ 252) making clear that States alone have authority to set intrastate prices with no obligation to follow FCC rules on the subject.

Congress did give the FCC some specific responsibilities under section 251. In section 251(e)(1), it assigned to the FCC "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States." That is doubtless the kind of "unambiguous" and "straightforward" provision the Supreme Court had in mind in Louisiana PSC. Congress also gave the FCC authority to prescribe regulations governing local "number portability" (§ 251(b)(2)), to prevent unreasonable or discriminatory conditions on the resale of telecommunications services (§ 251(c)(4)(B)), to determine which network elements must be unbundled (§ 251(d)(2)), and to determine which carriers are to be treated as "incumbents" under the Act (§ 251(h)(2)). As to these matters, however, the States may exercise concurrent jurisdiction. Congress specifically preserved the authority of States to enforce any "regulation, order, or policy" relating to LECs' intrastate access and interconnection obligations, so long as it is consistent with the requirements of section 251 and does not substantially prevent implementation of those requirements or the purposes of

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Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, at 8 (FCC May 16, 1996). See generally Order ¶ 80 & n.125 (citing comments from other State commissions).

the Act's local competition provisions. § 251(d)(3); see also § 261(b) (authorizing States to prescribe regulations "not inconsistent with the requirements of" the Act's local competition provisions).

Jurisdiction as to all other intrastate matters is governed by the rule of section 2(b). Unless the FCC can point persuasively to an "unambiguous" grant of intrastate jurisdiction — or unless it can establish that a particular State regulation interferes with the requirements of section 251 or "negates" the FCC's exercise of its interstate jurisdiction — these other matters lie beyond the Commission's lawful jurisdictional reach.

There is no question that local interconnection, unbundling, and resale are intrastate matters. See Order ¶ 84. Because the FCC proceeded on the mistaken assumption that the 1996 Act obliterated the section 2(b) jurisdictional divide, it has not justified its assertion of unbounded jurisdiction over these matters. Unless and until the FCC can establish its jurisdiction in accordance with the proper statutory standards, its attempt to impose broadly preemptive regulations binding on the States cannot be sustained. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (A reviewing court "must judge the propriety of [administrative] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action.").

The Commission's Order and accompanying rules should therefore be vacated in their entirety and remanded for further consideration in accordance with a correct understanding of the statute's jurisdictional requirements. Insofar as the FCC has purported to regulate pricing matters, however, no remand is required or appropriate. As we demonstrate in the following section, the 1996 Act expressly entrusts pricing authority exclusively to the States. The Court should therefore declare the FCC's pricing rules unlawful and instruct the FCC that it is without jurisdiction to re-impose such rules.

B. Congress Expressly Allocated Pricing Jurisdiction Exclusively to the States

1. The text of the 1996 Act could hardly be more plain in its allocation of pricing jurisdiction. The analysis starts with section 252(d), which specifically addresses "Pricing Standards." Subsection (d)(1) provides that "[d]eterminations . . . of the just and reasonable rate[s]" for interconnection and network elements in arbitrated agreements are to be made "by a State commission." Likewise, subsection (d)(2) specifies that "a State commission" shall determine whether a carrier's reciprocal compensation arrangements are just and reasonable, and subsection (d)(3) provides that "a State commission shall determine wholesale rates" for a carrier's retail services. Significantly, section 252(d) "makes no mention of FCC rules on pricing." Stay Order at 13.

Section 252(c) is to the same effect. It provides unequivocally that in arbitrations the "State commission shall . . . establish any rates for interconnection, services, or network elements." That language leaves no room for doubt: the States, not the federal government, are authorized to establish "any rates" under the new statute. "Again," as the Court noted, "no reference is made to FCC regulations regarding rates." Stay Order at 14.

The structure of section 252(c) fortifies the conclusion that pricing matters are entrusted solely to the States. In defining the State commissions' arbitration responsibilities, section 252(c) creates a clear dichotomy (introduced by the Conference Committee) between pricing, on the one hand, and matters for which section 251 expressly assigns the FCC some rulemaking authority, on the other. Thus, subsection (c)(1) provides that, when States arbitrate open issues on matters within the bounds of the FCC's jurisdiction, they must ensure that the result meets both "the requirements of section 251" and "the regulations prescribed by the [FCC] pursuant to section 251." In contrast, subsection (c)(2), which addresses pricing as a separate matter, makes no reference to any FCC rules. Instead, it provides only that States shall "establish rates . . . according to subsection (d)" — that is, according to the pricing standards set forth in section 252(d). As the Court observed at the stay stage, "where Congress intended for the state commissions to follow FCC rules in arbitrations, it expressly said so." Stay Order at 14. Congress said nothing about the State commissions following FCC pricing rules, precisely because no such FCC rules were contemplated. On the contrary, Congress intended the States alone to implement the Act's pricing standards, and that is why the only command to the States in section 252(c)(2) is that they set rates according to section 252(d).

A plain reading of section 251(c) confirms that the FCC has no role in pricing. That section generally imposes duties on incumbent LECs, including the duty to charge rates that are "just, reasonable, and nondiscriminatory," "in accordance with . . . the requirements of this section and section 252." §§ 251(c)(2)(D), 251(c)(3) (emphasis added). Section 252(d) in turn provides that State commissions are to determine just and reasonable rates "for purposes of" section 251(c)(2) and (c)(3). These mutual cross-references thus close the circle and leave no room at all for the FCC. The conclusion is inescapable: the just and reasonable rates called for by section 251(c) are to be determined solely by the State commissions in accordance with section 252(d).

2. Despite the Act's clear assignment of pricing authority to the States, the FCC asserts, as if it were reading an entirely different statute, that "[w]e interpret the Commission's role under section 251 as ensuring that rates are just, reasonable, and nondiscriminatory," and "we believe it to be within our discretion to adopt national pricing rules" binding on the States. Order ¶ 111. Under no plausible reading of the statute can the FCC remotely support this brazen attempt to divest the States of their pricing jurisdiction and relegate them to a subordinate role as servants of the federal agency.

The FCC's argument rests principally on section 251(d)(1), which provides that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." The FCC sees in this provision a license, "without limitation," to exercise plenary rulemaking authority over all provisions of section 251. Order ¶ 115. Since section 251(c) provides that rates for interconnection and network elements must be "just" and "reasonable," it follows, under the FCC's analysis, that the Commission must have paramount pricing jurisdiction in order to define these terms and to ensure that carriers' rates satisfy the statutory requirements. See Order ¶¶ 115, 117. But this "roundabout construction of the statute" (Stay Order at 15) is fundamentally flawed.

In the first place, section 251(d)(1) operates as a restriction on the Commission's authority, not as a broad grant of new pricing authority. It merely directs the FCC — which has a history of multi-year rulemaking proceedings — to adopt within six months whatever rules are necessary to implement the requirements for which the FCC was given express responsibility in other subsections of section 251. Nothing in this wholly procedural provision confers any new substantive jurisdiction on the FCC. Much less can it be read, as the FCC would read it, to nullify the Act's specific allocation of pricing jurisdiction to the States in section 252. Indeed, to the extent that section 251 makes reference to rates, it also points directly to the State commissions as the only entities authorized to set those rates.

Moreover, section 251(d)(1) must be read in light of section 251(d)(3), which Congress added specifically to prevent the kind of expansive preemptive reading that the FCC has given to subsection (d)(1). Subsection (d)(3) provides that the FCC "shall not" preclude the enforcement of any State access or interconnection rules that are "consistent with the requirements of this section" and that do not "substantially prevent" implementation of the section. The FCC's seizure of State pricing jurisdiction under the cover of section 251(d)(1) cannot be reconciled with the plain terms of this anti-preemption provision.

Finally, while the FCC predicates its jurisdictional theory on section 251, the pricing standards it purports to be implementing are in fact set forth in section 252(d). The FCC itself asserts that its pricing rules are "prescribed . . . under sections 251(d)(1) and 252(d)." Order ¶ 111 (emphasis added). But Congress gave the FCC absolutely no responsibilities under section 252(d). Rather, that section confers plenary implementing authority on the States. The FCC's analysis thus collapses of its own weight: the Commission cannot support its jurisdictional claims without invading territory expressly and unambiguously reserved to the States.

3. Nor can the FCC inflate its own jurisdiction by making an appeal for judicial deference to its statutory interpretation. See Stay Order at 14-15. First, the rule of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) — under which courts must defer to a reasonable statutory construction by the agency charged with administering the statute — is intended to honor a presumed congressional intention to delegate to the responsible agency the policy-making authority to interpret an ambiguous statute. See Pauley v. BethEnergy Mines, 501 U.S. 680, 696 (1991). Where Congress has directly spoken to an issue, however, "that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842; see also MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2231 (1994); United States v. Talley, 16 F.3d 972, 975 (8th Cir. 1994). Since sections 251 and 252 unambiguously reserve pricing jurisdiction to the States, the FCC's "interpretation" assigning pricing jurisdiction to itself deserves no deference at all.[6]

Second, even if there were some genuine ambiguity, the result would be no different. When Congress itself spells out the governing interpretive principles, its specific intentions necessarily override an agency's normal discretion to apply any "reasonable" construction.

[6] Nor is an agency entitled to deference when it interprets the boundaries of its own jurisdiction. As this Court has stated, Chevron "requires deference only where an agency reasonably construes the applicable statute on a matter which is within its jurisdiction to decide." Missouri v. Andrews, 787 F.2d 270, 286 (8th Cir. 1986).

That is precisely what Congress did in section 2(b). As the Supreme Court has explained, "by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, [section 2(b)] provides its own rule of statutory construction" and "presents its own specific instructions regarding the correct approach to the statute." Louisiana PSC, 476 U.S. at 376 n.5. The FCC may not circumvent this rule by claiming Chevron deference for an assumption of jurisdiction that flies in the face of section 2(b). As the Court stated in Louisiana PSC, to allow the FCC to "confer power upon itself" in such circumstances "would be to grant to the agency power to override Congress." Id. at 374-75.

II. THE FCC'S PRICING RULES AND PROXY PRICES ARE CONTRARY TO THE PLAIN TERMS AND EXPRESS INTENT OF THE ACT

Even if the Court finds that the FCC has no jurisdiction to impose its proxy prices and TELRIC methodology on the States, this Court should still address, and reverse, the FCC's specific pricing rules for at least two reasons. First, absent a judicial determination that the pricing rules are contrary to the statute, the FCC has indicated that it will apply those rules in any case in which it assumes jurisdiction from a State commission under section 252(e)(5) of the 1996 Act. Order ¶ 85. Second, the FCC has threatened to impose its pricing rules through the back door in adjudicating complaints under section 208, and in making its "public interest" determinations when Bell companies seek long-distance authority under section 271. Id. ¶¶ 124-127. Thus, a determination that the FCC lacks jurisdiction to impose its pricing rules on the States does not obviate review of the underlying merits of those rules.

rights of unregulated third parties. Nor can such a right be inferred more generally under the Communications Act.[21]

C. The FCC Erred in Reading Section 251(c)(3) to Allow New Entrants to Evade the Act's Limitations on Resale

In addition to expanding the definition of "network elements" and nullifying the Act's limitations on what elements incumbents must provide, the FCC eliminated yet another critical distinction that Congress built into the Act. Under section 251(c)(4), Congress imposed a distinct duty on incumbent LECs to provide retail services to requesting carriers at wholesale rates so that those carriers can resell the services to subscribers. Congress defined a distinct pricing standard for resold services, see § 252(d)(3) , and expressly restricted the uses that can be made of them, see § 271(e)(1) . The Order would nullify these provisions by construing section 251(c)(3) to give requesting carriers an entirely different avenue for reselling the incumbent LEC's own finished service, solely through the imaginary process of "unbundling" the LEC's entire network and "reassembling" the pieces. See Order ¶¶ 338-41. The FCC's "rebundle" rule in effect adds to the two options enacted by Congress (unbundled elements and resale) a third option that does not appear in the statute (rebundled elements). These rebundled elements can be exactly the same, in every respect, as the LECs' resold services, but they must be priced at rates much lower than those derived from the wholesale discount for resold services. This not only is contrary to the terms of

[21] See, e.g., Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 406 & n.11 (1974) (FCC has no power to alter rights established under the Copyright Act).

section 251(c)(3), but also flatly contradicts the specific pricing standards and other restrictions that Congress crafted for limiting the reselling of services under the Act.

The plain terms of section 251(c)(3) refute the notion that services can be obtained for resale simply by purchasing an incumbent's entire network as "unbundled elements." In imposing a duty on incumbents to provide access to "elements" of their network, section 251(c)(3) by its terms contemplates an obligation to provide discrete elements — that is, parts of the network — on an "unbundled basis." A new entrant that purchases an incumbent's entire network from end to end, however, is not getting anything on an "unbundled basis."

The FCC attempts to justify its reading of the unbundling duty in part by noting that under section 251(c)(3) a requesting carrier should be allowed to "combine such elements" to provide telecommunications services. Order ¶ 293. But just as a requesting carrier purchasing the whole network is not obtaining any "part" of the network on an "unbundled basis," so it is not "combining" any "elements" that have been "unbundled." Rather, the requesting carrier is simply buying fully finished telephone services. Any "unbundling" or "combining" involved in the entire process is the purest fiction. It is as if the FCC had transformed a statutory obligation to sell spare parts for an automobile into a requirement that incumbents provide a fully assembled car. Once again, by allowing new entrants to buy services from incumbents under the "unbundled elements" label, without having to contribute any network facilities of their own, the FCC is creating a profound disincentive to facilities-based competition in direct contravention of congressional intent.

The FCC would also require incumbent LECs to treat some retail telecommunications services — so-called vertical services that are provided on the network switch, such as Caller ID and call forwarding — as if they were themselves unbundled network elements. See Order ¶ 263, 413. Indeed, the Order obligates incumbents to offer these services to competitors as both unbundled elements and finished services for resale. But it would have been nonsensical for Congress to direct State commissions to establish two different prices for the same service. Nor did Congress do any such thing. As already noted, the Conference Committee chose to eliminate the term "services" when it defined the scope of unbundling. Conference Report at 121. Congress also specified that unbundled elements are to be used only as inputs "for the provision of" a competitor's own telecommunications services, § 251(c)(3), and separately addressed resale of "telecommunications services" that are offered to retail customers, § 251(c)(4). Thus, Congress clearly indicated that the resale provisions, not the unbundling requirements, control where the incumbent's finished telecommunications services are at issue. See generally United States v. Eagle, 539 F.2d 1166, 1173 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977) (specific provisions govern over general ones).[22]

[22] Moreover, if a particular telecommunications service is available via resale, its unavailability as an "unbundled element" would clearly not "impair the ability of a [competing] carrier . . . to provide the services that it seeks to offer." § 251(d)(2)(B). Thus, even if a vertical service were wrongly viewed as a "network element" under the statute, the incumbent LEC still should not have to provide it in the form of an "unbundled element" pursuant to the Act's separate pricing rules for such elements.

Giving new entrants the right to order, as "network elements," either the assembled collection of network facilities needed to provide a telecommunications service or individual vertical services would allow them to evade express statutory limitations on a competitor's right to resell the incumbent's retail services. Unlike unbundled network elements, which incumbents must offer to their rivals at cost (47 U.S.C. § 252(d)(1)), incumbents must set the prices for services for resale by discounting from retail rates. See 47 U.S.C. § 252(d)(3) (wholesale service rates equal "retail rates charged to subscribers for the telecommunications service requested, excluding . . . costs that will be avoided by the local exchange carrier").

Congress legislated this difference in order to prevent exploitation of regulatory price differentials. See H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 72 (1995) ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . ."). Regulators require incumbent carriers to provide certain services to certain consumers at artificially low rates (for example, basic telephone service to rural users). Incumbents are expected to subsidize these public service burdens by pricing other services above cost (for example, service to business users and vertical services such as Caller ID and call waiting). If competitors could obtain business services or vertical services at cost rather than at prices pegged to retail rates, they could be used unfairly to serve an incumbent's "subsidizing" customers at prices below those that the incumbent must charge to recoup the cost of serving subsidized customers. A competitor could thereby undercut the incumbent's prices and take its customers, without providing any improvements on the incumbent's service.

Creating such an opportunity for arbitrage would drive incumbent carriers toward financial ruin and threaten the public service objectives that State regulators are trying to achieve. To avoid losing the customers from whom they earn a profit, incumbents would have to reduce their prices. The contribution to public-service subsidies that those customers provided would be lost, although incumbents would not be freed of their public service obligations. This combination of cost-based competition and regulatorily-imposed subsidies, as the Commission has acknowledged, "is inherently unstable and unsustainable." Order ¶ 8.

The Order similarly allows carriers completely to evade the Act's express restriction on the joint marketing of resold local services, thus reading that restriction out of the statute as well. Congress sought to ensure level competition by preventing large long-distance carriers from jointly marketing their long-distance service with local service obtained from a Bell company incumbent under the Act's resale provisions, until the Bell company is authorized to provide long-distance service in its home region. See 47 U.S.C. § 271(e)(1). This section is intended "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services," an option that is likely to be highly attractive to consumers. S. Rep. No. 23, 104th Cong., 1st Sess. 43 (1995). As the FCC acknowledges, however, a carrier selling the equivalent of the Bell company's retail service through the use of unbundled network elements would not be subject to the joint marketing restriction. Order ¶ 335. The FCC has taken a mandatory restriction in the Act and made it trivial to avoid.

The FCC should not be permitted to nullify Congress's intended distinction between network elements and finished services subject to resale merely by redefining network elements to include existing LEC retail services.

D. By Requiring Incumbents to Turn Major Portions of Their Networks and Operations Over to Competitors, the FCC's Order Would Effect an Unauthorized Taking of Property

We have already seen that the FCC's pricing rules, if allowed to stand, would lead to confiscatory rates for network elements and wholesale services. This same infirmity infects the Commission's demand that LECs make additional investments in their networks for the benefit of their competitors. But the rules concerning unbundling and resale discussed in this section also create another, distinct takings problem: the unacknowledged effect of the FCC's rules is to take LEC property for public use without statutory authority to do so. By permitting new entrants to appropriate all aspects of the LEC's existing business, demand upgrades from the LEC, and evade statutory restrictions on resale, the FCC's rules effectively nationalize the LEC's business for the benefit of its competitors. Since Congress never authorized such a wholesale takeover of the LEC's business, the FCC's rules cannot stand.

Congress required the LECs to grant competitors access to the critical, physical portions of their existing networks. Congress also required the LECs to permit physical collocation of competitors' equipment as necessary for such access. But the FCC has taken these limited requirements and expanded them into an expropriation of LEC networks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321 (and Consolidated Cases)

IOWA UTILITIES BOARD, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Consolidated Petitions to Review an Order of the
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ARGUMENT

I. CONGRESS EXPRESSLY ASSIGNED PRICING JURISDICTION EXCLUSIVELY TO THE STATES AND PRESERVED THE HISTORICAL BAR AGAINST FCC JURISDICTION OVER INTRASTATE SERVICES AND FACILITIES

In our opening brief, we demonstrated that the 1996 Act expressly assigns pricing jurisdiction to the States. As we explained, section 252(d), which governs "Pricing Standards," unequivocally states in three separate places that a "State commission" shall determine the rates for interconnection, network elements, reciprocal transport and termination arrangements, and wholesale services. This express assignment of jurisdiction to the States is confirmed by the bifurcated structure of section 252(c), which governs arbitrations by State commissions: section 252(c)(2) addresses pricing matters separately and directs a State commission to "establish rates . . . according to subsection (d)," which in turns gives exclusive pricing jurisdiction to the States and makes no reference to FCC regulations. In short, both the text and the structure of section 252 straightforwardly assign pricing jurisdiction exclusively to the States.

Neither the FCC nor its supporters have ever come to grips with the plain language of the Act. Instead, they try to sidestep the text by offering up two far-fetched arguments:

First, from the benign premise that Congress gave the FCC rulemaking authority to carry out the substantive responsibilities specifically assigned to it, they conclude illogically that the FCC must have substantive jurisdiction over all matters covered by the 1996 Act, even if the Act expressly assigns jurisdiction elsewhere, as it does for pricing. FCC Br. 22-

27; AT&T Br. 34-48.[2] This Washington-centric argument fails to recognize that Congress can — and, in the 1996 Act, did — establish federal duties and standards to be implemented by the States, without turning over primary control to a federal bureaucracy.

Second, despite the unambiguous terms of section 2(b) — which prohibits the FCC from asserting jurisdiction over intrastate services or facilities — the FCC and its supporters now claim for the first time that the FCC may exercise plenary jurisdiction over local exchange facilities long understood to be within the exclusive province of the States, because those facilities are used for both intrastate and interstate service. FCC Br. 28-33; AT&T Br. 25-31. This argument gets the FCC nowhere on pricing jurisdiction: regardless of whether section 2(b) applies here, the text of section 252 still controls, and it allocates pricing jurisdiction expressly to the States, not the FCC. With respect to both pricing and non-pricing rules alike, moreover, the FCC is simply wrong in asserting that the rule of section 2(b) does not apply to the services and facilities at issue in this case.

A. The FCC's General Authority To Make Rules Does Not Give It Jurisdiction Over Pricing or Other Intrastate Matters

No one denies that the FCC is empowered to promulgate otherwise valid rules to govern the matters properly within its jurisdiction. But the statutory provisions giving the FCC general rulemaking authority do not answer the question presented here: whether Congress has given the FCC jurisdiction to control the rates, services, and facilities addressed by sections 251 and 252 of the Act. The answer to that question is found

[2] For convenience, we refer to the Joint Brief of Intervenors in Support of the FCC as "AT&T Br." We refer to those joint intervenors collectively as "AT&T."

elsewhere in the statutory text. As we have shown, section 252 of the 1996 Act expressly allocates solely to State public utility commissions the authority to regulate the rates at issue; and Congress refused to alter the rule of section 2(b), under which the FCC may not assert jurisdiction over any aspect of intrastate charges, services, or facilities.[3]

The FCC cannot deny, of course, that the 1996 Act explicitly directs the States to "establish" and "determine" "just and reasonable" interconnection rates. 47 U.S.C. § 252(c)(2) and (d). The FCC is forced to argue, therefore, that "[i]ssuing rules and establishing rates are different functions" and that, while Congress directed the States to "establish" rates, it simultaneously directed the FCC to "issue rules governing" those rates. FCC Br. 16-17. But the FCC's argument is triply flawed. First, the Order indisputably establishes rates — the very proxy prices from which the FCC now tries so hard to distance itself. Second, section 252(d) itself embodies the rules for setting rates. Third, the FCC's distinction is hollow, for its detailed pricing rules would leave the States with nothing more than the ministerial role of punching numbers into the FCC's mandatory rate formula.

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[3] The FCC draws false comfort from a snippet of text lifted out of context from a book co-authored by one of the lawyers signing this brief. According to the FCC, the quoted language proves that the LECs' "lawyers" "initially read the Act to require the <u>FCC</u> to craft [a] 'new regulatory regime.'" FCC Br. 12. But the quoted passage refers to the Act <u>as a whole</u>, the provisions of which extend far beyond local interconnection issues. With respect to the matters involved in this case, the authors specifically note (in passages apparently overlooked by the FCC) that "it is really the state commissions that wield the power on interconnection" and, in particular, that the States, not the FCC, are "to determine whether the rates for interconnection are just and reasonable." P. Huber, M. Kellogg, J. Thorne, <u>The Telecommunications Act of 1996</u>, §§ 1.1.9, 1.1.10, at 22-23, 26 (1996).